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NO. 85-914

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

FRANK JURECZKI,
Petitioner,

v.

THE CITY OF SEABROOK, TEXAS; CURTIS WHITE; JUDGE JOE PIRTLE; STEVEN WALTERS; AND BILL KERBER,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

BRUCE L. JAMES
800 Allied Bank Plaza
Houston, Texas 77002
(713) 654-4488

Counsel for Respondents

Of Counsel:

SACCOMANNO, CLEGG, MARTIN & KIPPLE
800 Allied Bank Plaza
Houston, Texas 77002

Alpha Law Brief Co., Inc.—5606 Parkersburg—Houston, Texas 77036—223-3003

QUESTIONS PRESENTED FOR REVIEW

I. Whether the Fifth Circuit Court of Appeals correctly held that, even if a Building Inspector acts with malice in filing a complaint with the clerk of a Municipal Court, if there exists probable cause at the time for the Municipal Judge to issue a warrant of arrest, the arrest is constitutional.

II. Whether the United States District Court and the Fifth Circuit Court of Appeals violated Petitioner's seventh amendment right to trial by jury by granting a Motion for Directed Verdict.

III. Whether the alleged single deviation by a City Building Inspector of an alleged policy or custom imposes liability upon the municipality under *Monell v. Department of Social Services*, 436 U.S. 658, 98 S. Ct. 2018 (1978).

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioner, Frank Jureczki ("Jureczki"), invoking 42 U.S.C. Section 1983 (1976), brought this action seeking damages and injunctive relief from the City of Seabrook,

Texas ("Seabrook"), its City Manager Steven Walters ("Walters"), Chief of Police Bill Kerber ("Kerber"), former Building Inspector Curtis White ("White") and Municipal Judge Joe M. Pirtle ("Pirtle"), for alleged violations of Petitioner's constitutional rights through the enforcement of the Seabrook Zoning Ordinance. The case was tried to the Court and a jury and upon the close of Petitioner's evidence Respondents' Motion for Directed Verdict was granted. (Appendix to Petition for Writ of Certiorari, at A16-A36)

Seabrook is a home-rule city located principally within Harris County, Texas. White served as the Building Inspector for Seabrook from July 19, 1977, until his retirement on September 3, 1981. Kerber has been the Chief of Police for Seabrook since February 16, 1979.

Jureczki is the owner of a restaurant known as The Shrimp Hut located in Seabrook and is a full time shrimper and restaurateur. In early June, 1980, Jureczki decided to expand his restaurant by constructing a "sun barrier" over approximately 10 outdoor picnic tables which were placed adjacent to the main building on a grated area. Jureczki and White met in June of 1980 to discuss the new addition. White and Jureczki differ as to the substance and detail of the discussion concerning the possibility of various structures discussed to provide shade over the picnic tables at The Shrimp Hut. White testified that he told Jureczki that he would need a building permit. Jureczki testified that White told him no permit was needed.

The sun barrier was erected over the weekend of July 12 and 13, 1980, by Jureczki and his son. The structure was approximately 36 feet long by 24 feet wide and was

supported by approximately ten 7 inch by 10 inch creosote pilings and had a flammable thatched roof. White did not discover the sun barrier until after he came to work on Monday, July 14, 1980, when he observed that the thatched roof structure was substantially in place and noted that a building permit had not been issued for the structure, which was a violation of the City of Seabrook Comprehensive Zoning Ordinance No. 78-12. White testified that he made several unsuccessful attempts by phone and personal visit to The Shrimp Hut to contact Jureczki regarding building a structure without a building permit.

On or about July 17, 1980, White filed complaints against Jureczki for violating the Zoning Ordinance of Seabrook in failing to obtain a building permit prior to construction. White met with City Manager Walters on July 17, 1980, and discussed with him the filing of the complaints against Jureczki. Walters concurred in the decision to file the complaints. On July 17, 1980, Judge Pirtle signed two warrants of arrest and those warrants were delivered to the Seabrook Police Department and were acted upon on July 18 when the two arrest warrants were served on Jureczki at his residence in Seabrook. The officer knocked on Jureczki's door, did not forcibly enter Jureczki's home, and announced that he was placing Mr. Jureczki under arrest pursuant to the arrest warrants. Jureczki's wife was allowed to get Jureczki a pair of shoes and a shirt to complete his dressing and the police did not perform any type of search of his person or home. Jureczki was not handcuffed and no guns or pistols were drawn by the police officers. In fact, Jureczki was allowed to drive his own car to the police station and no police officer rode with him in his car. Jureczki was not placed

in a jail cell or holding tank, did not suffer any physical abuse or bodily harm, was not touched by any police officer, and was released upon posting bond.

The decision to issue an arrest warrant was not prompted by White, Walters, or any other official of Seabrook, but was the independent decision of Judge Pirtle.

Jureczki met with White again and was advised that every day the building erected on the weekend of July 12 and 13 stayed in its present location could result in another complaint being filed against him. While Jureczki finally obtained a building permit, the terms of this permit allowed Jureczki to erect or construct a structure similar to what he had previously erected by adding an additional rafter, changing the thatched roof to a corrugated tin roof, relocating the offending structure, and complying with the Building Code. Jureczki knew that the building permit issued on July 25, 1980, did not involve the building constructed on the weekend of July 12 and 13. Since the offending structure was still in place on July 31, 1980, another complaint was filed by White and another warrant of arrest was signed by Judge Joe Pirtle for that complaint. Again, White met with Walters on July 31, 1980, concerning the filing of a complaint and both felt that Jureczki had not complied with the request to remove the offending structure within a reasonable time and that since each and every day the offending structure continued in the location originally erected was a continuing violation, another complaint was appropriate. On July 31, 1980, Judge Pirtle independently issued another arrest warrant after the complaint was filed by White. The arrest warrant was delivered to the Seabrook Police Department and Jureczki was arrested. Jureczki was hand-

cuffed, taken into custody and transported to the Seabrook Police Station where he was fingerprinted, photographed and booked. Jureczki was held in custody for approximately one hour. After posting bond, Jureczki was released from custody.

Neither White nor Walters discussed the Jureczki matter with any other official of Seabrook concerning the filing of the third complaint or discussed with Judge Pirtle, or any police officers or other employees of Seabrook, the fact that an arrest warrant could be issued on the third complaint filed against Jureczki. Jureczki has never argued that any of the warrants of arrest were invalid, or that no probable cause for arrest existed.

The United States Court of Appeals for the Fifth Circuit affirmed the decision of the United States District Court for the Southern District of Texas granting the Respondents' Motion for Directed Verdict at the close of the evidence presented by Petitioner Frank Jureczki in the five day trial conducted in Houston, Texas. *Jureczki v. City of Seabrook*, 760 F.2d 666 (5th Cir. 1985). The United States Court of Appeals for the Fifth Circuit denied Petitioner Jureczki's Motion for Rehearing and Motion for Rehearing en Banc.

REASONS FOR DENYING THE WRIT

The issues raised by Petitioner do not warrant this Court's attention. Failure to obtain a building permit is a violation of the Zoning Ordinance of Seabrook. Such violations are routinely brought to municipal court as a misdemeanor upon the filing of a valid complaint. No attack has ever been made upon the validity of the com-

plaint filed against Jureczki by White. Even if there was a misunderstanding between White and Jureczki as to the need for a building permit, such does not prevent White from filing a complaint containing his version of the facts and is not a constitutional deprivation of any due process right guaranteed under the United States or Texas Constitution. A judge's independent determination of probable cause breaks the chain of causation and insulates the initiating party from liability under 42 U.S.C. Section 1983.

The District Court's decision to grant a Motion for Directed Verdict was proper in that the Court reviewed the evidence drawing all reasonable inferences in light most favorable to Jureczki and concluded that reasonable men and women in the exercise of impartial judgment could not arrive at contrary results in deciding that Jureczki was denied neither due process nor equal protection since the complaint filed against him was accurate and contained no material omissions and constituted probable cause for an arrest.

While the City Building Official for Seabrook is delegated the responsibility to enforce the Zoning Ordinance for the City, those decisions can be reviewed by a Board of Adjustment or the City Council, and the remedies available to enforce the ordinance by the Building Official are left to his discretion. Jureczki failed to establish by appropriate evidence any policy or custom of Seabrook that unlawfully deprived him of constitutionally protected rights and therefore imposed municipal liability on Seabrook.

I.

The petition should be denied because the Fifth Circuit Court of Appeals correctly held that, even if a Building Inspector acts with malice in filing a complaint with the clerk of a Municipal Court, if there exists probable cause at the time for the Municipal Judge to issue a warrant of arrest, the arrest is constitutional.

Petitioner has requested this Court to assume various facts which were not proved by any evidence in the record brought to this Court. The truth is Petitioner Jureczki did not fully describe the structure that he wanted to build and he so admitted. This Court should not assume that White acted maliciously absent proof by Petitioner of that fact. The assumptions asserted by Petitioner in his brief ignores the factual dispute between the parties as to what White told Jureczki was needed with respect to obtaining a building permit at the probable cause stage. The argument presented by Jureczki that because White told him no permit was required thereby causes a wrongful filing of a complaint that is protected under the United States Constitution due process clause is simply untenable and unfounded at the probable cause stage in both fact and law. Assuming Jureczki is correct that there was a misunderstanding between he and White, the alleged statement that White told him that no building permit was required is merely a defense that he could assert in the criminal prosecution. White consistently denied that he ever told Jureczki no permit was needed. The Building Official of Seabrook, as well as any other aggrieved party, has the right to file a complaint with the clerk of the Municipal Court of Seabrook alleging a violation as he believes it to be of the Zoning Ordinance

by any other individual, including Jureczki, for erecting a structure prior to obtaining a building permit. That is the only action White took. White swore out a complaint alleging that Jureczki erected a structure prior to obtaining a building permit to do so. There is no evidence that Walters was ever informed by White or anyone else that Jureczki was told that no building permit was required for the unlawful structure erected by Jureczki. The argument put forward by Jureczki that he was told by White that he did not need a building permit does not raise the defense of estoppel under the laws of the State of Texas. The case of *City of Dallas v. Gaechter,* 524 S.W.2d 400 (Tex. Civ. App.—Dallas 1975, writ dism'd), held that the City of Dallas was not estopped from seeking lowering or removing of an advertising sign erected in violation of the City's Airport Zoning Ordinance by the fact that the City Building Inspection Department had initially issued a permit to erect that sign. Jureczki argues that White should have disclosed in the complaint that Jureczki was told that no permit was needed since that is what Jureczki testified occurred. While this Court and the Courts below should consider the evidence in the light most favorable to Jureczki in testing the Motion for Directed Verdict, White testified consistently that he never told Jureczki no permit was needed. How can Jureczki argue then that a fact which White denies occurred should have been disclosed in the municipal complaint that was filed? The point is not that the District Court has made a factual determination whether or not such statement was made by White but that White denies that it occurred. White's denial should be viewed only in a determination of probable cause for filing the criminal complaint against Jureczki. While the argument of Jureczki denies fair play between White and Jureczki,

there is no evidence that any other Seabrook official was aware of the alleged conversation that no permit was required. Certainly the building official, who was provided only an oral description of what was to be erected, and then discovers that such erection is in fact, *in his belief*, in violation of the Zoning Ordinance and therefore does require a permit, will not be estopped or prohibited from proceeding against an individual to compel obtaining a building permit through any appropriate means of enforcement. White's malice, which the Court of Appeals for the Fifth Circuit assumed for the purposes of the appeal, is irrelevant in obtaining a warrant where probable cause exists. *Jureczki v. City of Seabrook*, 760 F.2d 666, 668 (5th Cir. 1985); *Howell v. Tanner*, 650 F.2d 610 (5th Cir. 1981). A judge's determination of probable cause breaks the chain of causation and insulates the initiating party from liability. *Smith v. Gonzales*, 670 F.2d 522, 526 (5th Cir. 1982) cert. denied, 459 U.S. 1137, 103 S. Ct. 772 (1982).

Jureczki's argument would allow the assertion of a civil rights claim any time the complaining party's statement is disputed. White's complaint initiated the legal proceedings to bring Jureczki before the Municipal Court of the City of Seabrook. It was the independent decision of Judge Pirtle under the laws of the State of Texas to issue the warrant of arrest and not at the decision or request of the building official White. Jureczki may have a claim against White for a tort cognizable under the common law of Texas but has failed to prove by evidence sufficient to go before a jury that any of his constitutionally protected rights were violated by the filing of a complaint by White or the issuance of an arrest warrant by Judge Pirtle. *Parratt v. Taylor*, 451 U.S. 527, 101 S. Ct.

1908 (1981); *Cook, et al v. Houston Post,* 616 F.2d 791 (5th Cir. 1980); *Beker Phosphate Corp. v. Muirhead,* 581 F.2d 1187 (5th Cir. 1978).

II.

The record does not support Petitioner's claim that the District Court and the Fifth Circuit violated his seventh amendment right to trial by jury.

Jureczki's argument that he has been denied his right to trial by jury stems from his alleged violation of his right to equal protection of the laws. His equal protection of the law claim stems from his assertion that White failed to follow his alleged custom of first warning a violator of the possibility of summons or arrest and then allowing the violator to correct the deficiencies. Jureczki wholly failed in his evidence to establish that White had such a custom or usage to be held liable under Section 1983. As Professor Wright has so succinctly stated in his text on the law of federal courts,

> "For a person to be liable under Section 1983 he must have acted under color of state law, or, in the more precise statutory term, 'under color of any statute, ordinance, regulation, custom or usage' of a state, territory, or the District of Columbia. It has been held that 'custom, or usage' requires state involvement and is not simply a practice that reflects long-standing social habits, generally observed by the people in a locality. The custom or usage 'must have the force of law by virtue of the persistent practices of state officials.' " C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS, Section 22A, at 122 (4th ed. 1983), citing *Adickes v. S. H. Kress & Company,* 398 U.S. 144, 167, 90 S. Ct. 1598, 1613 (1970).

Can a building official establish by a "custom" a constitutionally protected due process right to an additional notice prior to the filing of a complaint with the Municipal Court? Jureczki merely asserts a procedural defect. Jureczki has proven no deprivation of some right previously held under federal law and, thus, there is no entitlement to due process protection of the procedure prescribed by the ordinance. *Leis v. Flynt,* 439 U.S. 438, 99 S. Ct. 698, 701 (1979); *Adams v. Wainwright,* 445 F.2d 832 (5th Cir. 1971), cert. denied, 404 U.S. 860 (1971); *U. S. ex rel. Hayward v. Johnson,* 508 F.2d 322 (3rd Cir. 1975), cert. denied, 422 U.S. 1011 (1975); *Hamilton v. Chaffin,* 506 F.2d 904 (5th Cir. 1975). While Respondents assert that Jureczki has failed to establish by any evidence such a custom of giving notice by White, if notice was the custom or policy of the City, then it was only White who failed to follow such policy. Jureczki failed to prove that it was a custom. Can a custom be established when a statute, ordinance, regulation, or guideline gives the building inspector the discretion to use different means for a given situation in enforcing a zoning ordinance? *Bennett v. City of Slidell,* 728 F.2d 762, 768 (5th Cir. 1984). The evidence clearly shows that Jureczki had dealings with White since moving to Seabrook in 1976. In 1977, five complaints were filed against Jureczki by White. No evidence was produced by Jureczki to show he received written notice prior to filing of those complaints. In February of 1980, Jureczki commenced construction of a garage prior to obtaining a building permit to do so. White informed Jureczki that he had to obtain a building permit immediately and paid twice the permit fee as a penalty for having started construction without a permit. Is there a constitutional impediment forbidding the building official

the discretion to proceed by different lawful means that he deems appropriate for each individual or in each factual situation that he confronts? Jureczki has not been deprived of a right secured by the Constitution and laws. *Baker v. McCollum,* 443 U.S. 137, 99 S. Ct. 2689, 2692 (1979). Jureczki's constitutional due process right "does not protect against all deprivations of liberty. It protects only against deprivations of liberty accomplished—without due process of law." *Baker v. McCollum,* supra at 2695.

III.

An alleged single unlawful act by a city building inspector of an alleged policy or custom does not impose municipal liability under the decision in *Monell v. Department of Social Services,* 436 U.S. 658, 98 S. Ct. 2018 (1978).

The defendant in a Section 1983 action must be a "person," and this has been construed as a term of art. In *Monroe v. Pape,* 365 U.S. 167, 81 S. Ct. 473 (1961), this court first held, on the basis of the 1871 enactment, that a municipal corporation is not a "person" in this sense. In 1978, however, in *Monell v. Department of Social Services,* 436 U.S. 658, 98 S. Ct. 2018 (1978), this Court re-examined the legislative history of the 1871 law, and concluded that its previous reading of that history had been erroneous.

Under *Monell* a local government can be sued for monetary, declaratory, or injunctive relief, but only if the action that is alleged to be unconstitutional implements or executes "a policy statement, ordinance, regulation, or decision officially adopted and promulgated" by the officers of the corporation or has been taken "pursuant to

governmental 'custom' even though such a custom has not received formal approval through the body's official decision making channels." *Monell v. Department of Social Services, supra,* 436 U.S. at 690-691, 98 S. Ct. at 2036. A municipality "cannot be held liable solely because it employs a tort-feasor—or, in other words, a municipality cannot be held liable under Section 1983 on a *respondeat superior* theory." *Monell v. Department of Social Services,* supra, 436 U.S. at 691, 98 S. Ct. at 2036. The custom or usage "must have the force of law by virtue of the persistent practices of state officials" and is not simply a practice that reflects long-standing social habits, generally observed by the people in the locality. *Adickes v. S. H. Kress & Company,* supra. Jureczki's attempt to show that an alleged isolated unlawful act by White binds Seabrook is a hollow attempt to get to the deep pockets of the City. The alleged single unlawful act has never been proved to be a custom or policy of the City of Seabrook. The single unlawful act, if there in fact was one, must be that White *failed* to notify Jureczki prior to filing a complaint in the Municipal Court of the City of Seabrook that he was going to do so. If Jureczki is alleging that the custom or usage was for White to notify alleged violators prior to filing a complaint, then the custom or usage is not what Jureczki is complaining about. His complaint is the failure of White to follow such custom or usage, not the custom or usage itself. A single discrete decision to do something will not cause 1983 liability, unless proof of the incident includes proof that it was caused by an existing, unconstitutional policy or custom, which policy or custom can be attributed to a municipal policymaker. *Oklahoma City v. Tuttle,* ____U.S.____, 105 S. Ct. 2427, 2436 (1985); *Bennett*

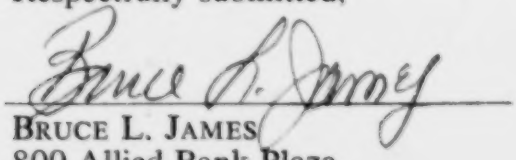
v. City of Slidell, 728 F.2d 762, 768 (5th Cir. 1984). Jureczki offered no such proof.

As the Court of Appeals for the Fifth Circuit noted, Jureczki may or may not have been treated unfairly, but five days of trial testimony show that he was denied neither due process nor equal protection. The complaint was accurate and contained no material omissions. It constituted probable cause for an arrest. Testimony at trial, read in whatever light, failed to establish a sufficient factual basis of disparate treatment to substantiate an equal protection violation. This Court should not disturb that determination. *Jureczki v. City of Seabrook*, supra at 670.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,



BRUCE L. JAMES
800 Allied Bank Plaza
Houston, Texas 77002
(713) 654-4488

Counsel of Record for Respondents

Of Counsel:

SACCOMANNO, CLEGG, MARTIN & KIPPLE
800 Allied Bank Plaza
Houston, Texas 77002

January 17, 1986

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that three true and correct copies of the aforegoing Respondents' Brief in Opposition have been served on all parties required to be served by serving opposing counsel, Joel Reinfeld, 191 Main Street, P. O. Box 613, Hackensack, New Jersey 07602, by certified, first class United States mail, postage prepaid, return receipt requested, all in accordance with Rule 28.3 of the Supreme Court of the United States, on the 31st day of January, 1986.

Bruce L. James

BRUCE L. JAMES